228718

BEFORE THE
SURFACE TRANSPORTATION BOARD

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant.

Docket No. NOR 42128

DEFENDANT NORFOLK SOUTHERN RAILWAY'S REPLY IN OPPOSITION TO COMPLAINANT'S MOTION TO ESTABLISH PROCEDURAL SCHEDULE

Pursuant to 49 C.F.R. Parts 1111 and 1117 and other applicable law and authority, Defendant Norfolk Southern Railway Company ("NS") respectfully submits this Memorandum in Opposition to Complainant South Mississippi Electric Power Association's ("SMEPA") premature "Motion to Establish Procedural Schedule," filed on January 11, 2011. The mediation period has just commenced, and the directly applicable Board regulation provides for the parties to convene a conference to discuss procedural matters within seven days "after the mediation period ends." 49 C.F.R. § 1111.10(b) (emphasis added). Because the mediation period has barely begun (the initial joint mediation session is scheduled for February 22), it is premature for the parties to even hold a post-mediation conference, let alone to conclude that conference and all post-mediation discussions of procedural matters, report their differences to the Board, or file a motion asking the Board to resolve those differences. Particularly in this case – which, based on the Complaint, appears to present novel and difficult questions of first impression whose resolution could significantly affect the time required for discovery and development of evidence – neither the Board nor the parties has sufficient information at this early juncture upon which to

determine a reasonable and appropriate procedural schedule. Moreover, following the timing established by Section 1111.10(b) will not prejudice Complainant's interests in this case. NS filed its Answer on January 18, 2011, twenty days after SMEPA filed its Complaint. Discovery has already commenced in this case, and NS will respond to SMEPA's discovery requests, and seek discovery from SMEPA, during the mediation period.

As explained more fully below, NS opposes SMEPA's Motion for a Procedural Schedule, and requests that the Board instead abide by its regulations, and establish a procedural schedule after the conclusion of mediation. This will allow the parties and the Board an opportunity to determine a reasonable schedule and address other procedural matters based on more complete information and a fuller understanding of the case. In the alternative, should the Board disregard the governing regulation and decide to issue a procedural schedule before the conclusion of mediation, NS proposes a more reasonable and appropriate schedule.

FACTUAL BACKGROUND

On or about January 4, 2011, counsel for SMEPA left a voicemail message with counsel for NS, indicating that SMEPA wished to have the conference required by the Board's rules no later than the following day. In response, NS counsel advised SMEPA counsel that the governing regulation provided that such a meeting should be conducted within seven days after the end of the mediation period. *See* 49 C.F.R. § 1111.10(b). NS counsel concluded by stating that, while he would be willing to engage in informal preliminary discussions concerning miscellaneous matters concerning the case in advance of the time provided by the Board's rules, NS would not agree to a proposed procedural schedule or "enter into any agreements on such matters unless and until the mediation period has ended." P. Moates Email to K. Dowd (Jan. 4, 2011) (copy attached hereto as Exhibit B). SMEPA counsel's response expressed his

disagreement, contending, *inter alia,* that the requirements of Section 1111.10(b) did not apply to Stand Alone Cost cases. NS counsel replied by reiterating NS's position, including that the clear language of Section 1111.10 governed the timing of the parties' obligation to hold a conference to discuss procedural matters and report the results to the Board, but NS counsel nonetheless would be willing to have telephone discussions concerning the case. *See id.* (Exhibit B).

Pursuant to that understanding, NS counsel participated in a telephone call with SMEPA counsel on January 5. In that call, the parties had preliminary conversations concerning several matters, including potential schedules and options. At no time did NS counsel indicate that NS had changed its position that these preliminary discussions did not constitute the conference of the parties contemplated by Section 1111. The parties did discuss an initial schedule suggested by SMEPA, which NS counsel indicated was unreasonable and would not be acceptable to NS. At the conclusion of the call, counsel for NS indicated he would discuss potential schedule options with his client and further advise SMEPA of NS's position thereafter.

On January 7, NS counsel confirmed to SMEPA NS's continuing position that, under the Board's regulations and the circumstances of this case, it was premature – the case had been filed only 10 days earlier, several of those days had been holidays or weekend days, and the Chairman had not sent his January 12 letter initiating the mediation period – for the parties to conduct a conference for purposes of attempting to establish a consensus proposed procedural schedule or negotiating other procedural matters. At the same time, cognizant of the Board's view that mediation and other preliminary matters should not delay rate case discovery, NS advised SMEPA that it would not object to discovery moving forward during the mediation period and agreed to SMEPA's proposed Protective Order.[1] Discovery has already commenced, with

[1] In a decision released on January 21, the Board adopted the proposed Protective Order.

SMEPA serving its "First Requests for Admissions, Interrogatories, and Requests for Production to Defendant Norfolk Southern Railway Company" on January 14, 2011. SMEPA filed the present Motion on January 11, 2011.

I. SECTION 1111.10(B) SPECIFIES THE TIMING FOR CONFERENCES OF THE PARTIES.

The governing regulation provides, in relevant part:

> *Stand-alone cost or simplified standards,complaints.*
>
> In complaints challenging the reasonableness of a rail rate based on stand-alone cost or the simplified standards, the parties shall meet, or discuss by telephone, discovery and procedural matters within 7 days after the mediation period ends. The parties should inform the Board as soon as possible thereafter whether there are unresolved disputes that require Board intervention and, if so, the nature of such disputes.

49 C.F.R. § 1111.10(b) (emphasis added). As SMEPA acknowledges, the express language of the regulation "appear[s] to be unambiguous." Motion at 3. The regulation expressly states – both in its title and in its text – that in "stand-alone cost" cases, the parties are required to have a conference to discuss "discovery and procedural matters within 7 days *after the mediation period ends*." § 1111.10(b) (emphases added). The regulation continues by requiring that the parties inform the Board as soon as possible "thereafter" – *i.e.*, after the seven-day period that does not even begin until the conclusion of mediation – "whether there are unresolved disputes that require Board intervention and, if so, the nature of such disputes." *See id.* SMEPA's Motion is directly contrary to this governing regulation, which authorizes parties to advise the Board of unresolved procedural disputes and seek Board intervention only after the conclusion of the mediation period.[2] The Board should apply the unambiguous, express language of this specific

[2] The parties have not reached impasse on the appropriate parameters of a procedural schedule. Rather, NS has simply advised SMEPA that, pending the parties' mediation discussions and consistent with the Board's regulations, additional negotiations concerning the procedural schedule are premature.

governing regulation to deny SMEPA's premature and unnecessary motion. Further, consistent with Section 1111.10(b), the Board should direct SMEPA not to file any further non-discovery procedural motion(s) unless and until: (i) the parties have had an opportunity to mediate this dispute; (ii) the mediation period has concluded without resolution of the case; and (iii) thereafter the parties conduct a Section 1111.10(b) conference and are unable to agree on procedural matters that are then ripe for the Board's consideration.

II. THE UNIQUE ISSUES PRESENTED BY THIS CASE, THE POTENTIAL FOR NARROWING THOSE ISSUES IN MEDIATION, AND THE LACK OF ANY PREJUDICE TO SMEPA FURTHER FAVOR DEFERRING ANY SCHEDULE DETERMINATION UNTIL AFTER THE CONCLUSION OF MEDIATION.

A. The Complainant Would Suffer No Harm if the Board, Following Its Regulations, Adopted a Procedural Schedule After the Conclusion of Mediation.

In addition to the clear command of Section 1111.10, a strong reason to deny SMEPA's Motion is that the issuance of a procedural schedule after mediation would cause the Complainant no harm or injury whatsoever. The aggressive procedural schedule SMEPA proposed in its Motion provides that the next scheduled event in this matter is the completion of discovery on June 15, 2011, fully four-and-one-half months from now. Mediation will be completed, on or before March 14, 2011, unless the Board extends the mediation period because the parties are making progress. *See* STB Chairman Elliot Letter to K. Dowd & P. Moates (Jan. 12, 2011) (appointing mediator and providing for conclusion of mediation on March 14, 2011). Thus, even assuming, *arguendo*, that the Board were to adopt the short schedule SMEPA presently advocates, the first event on the SMEPA's schedule would be more than three months away at the conclusion of mediation.[3] Moreover, discovery will continue during the mediation

[3] Technically, the first two events on SMEPA's proposed schedule are the filing of the Complaint and the filing of NS's Answer. *See* Motion, Appendix A. Because both of those tasks have been completed in accordance with SMEPA's proposed schedule, they are unaffected

period, so the adoption of a procedural schedule after mediation will have no effect on the progress of discovery. Even SMEPA does not allege – nor could it – that it will suffer any material harm if the Board does not issue a schedule before the conclusion of mediation. The Board should follow the governing regulation (Section 1111.10(b)) and deny SMEPA's premature and unnecessary Motion.

B. Novel Claims and Issues in this Case – Which the Parties Could Discuss in Mediation – Should be Taken Into Account in the Procedural Schedule.

Even after the end of the mediation period, the Board should not issue a schedule until it has fully considered novel issues and challenges presented by this case, and how the procedural schedule should account for the development, presentation, and resolution of those issues. The Complaint raises novel claims that implicate a number of significant issues that the Board has not previously addressed in a SAC case, and the development and disposition of those claims may very well require significant additional discovery, evidentiary submissions, and legal argument. Until the parties have presented their views and positions on how to proceed with respect to these issues, and the Board has determined how it will handle the issues, it cannot make informed decisions concerning the appropriate procedural schedule. The parties may discuss some of these matters in mediation. And if the case proceeds after mediation, they would be in a better position to discuss and present to the Board schedule proposals that take those factors into account.

First, and most significant, SMEPA's rate reasonableness Complaint has simultaneously invoked both the stand-alone cost ("SAC") constraint and the "revenue adequacy" constraint. *See* Complaint ¶ 18. Although the ICC had some very limited experience with the revenue adequacy ("RA") constraint during the evolution of the *Coal Rate Guidelines*, the Board has

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by the present Motion. The first event on SMEPA's proposed schedule that has not yet taken place is the close of discovery, which the Motion proposes be set for June 15, 2011. *See id.*

never considered or decided a challenge to rail carrier rates under that (RA) constraint.[4] Because the agency has no meaningful experience analyzing rail rates under the RA constraint – unlike its decades of experience applying the SAC constraint – there are essentially no rules, precedents, analytical framework, or specific standards for determining the reasonableness of a challenged rail rate under the RA constraint. In evaluating this RA challenge, the Board will confront a constellation of issues of first impression or unique application, including, for example:

- What additional information and evidence may be relevant to, or necessary for, a RA challenge and defense, and what additional discovery may be necessary or appropriate to develop that evidence?
- May a complainant seek relief for the same challenged rates under more than one constraint, or is it required to elect a single constraint?
- If a complainant is required to elect a single CMP constraint under which it will present its challenge, when must it make that election?
    - Before discovery? If so, could the defendant carrier be forced to go through resource-intensive discovery for two constraints, only to have much of that effort rendered unnecessary when the complainant elects one constraint or the other?
    - When it files its opening evidence?
- If a complainant were allowed to pursue challenges under multiple constraints in a single rate case, how would that affect the order of presentation of evidence, the number of rounds of evidence to be presented, and the time for development and presentation of the evidence?
- If the complainant were allowed to pursue more than one constraint, what would happen in the event of conflicting outcomes under the SAC and RA constraints (*e.g.* challenged rate found unreasonable under one constraint and reasonable under another)? How would such a conflict be resolved?
- What standards, evidence, and criteria will the Board use to determine in a particular case if a defendant rail carrier is long term "revenue adequate" or that the RA constraint may be applied?
- Would the Board seek to make a revenue adequacy determination for the defendant carrier as a whole and its entire system, for segments of the system used by the complaint traffic, or on some other basis? If the RA constraint is to be applied to the entire carrier,

[4] The Board did apply a type of revenue-adequacy analysis in a challenge to proposed *pipeline* rate increases under a different statute in much different circumstances. *See CF Indust., Inc. v. Koch Pipeline, L.P.*, 4 S.T.B. 637 (2000). Because of the significant differences between the *Koch* pipeline case and this rail carrier case, *Koch Pipeline* provides little useful guidance or precedent for this case.

systemwide, would there be any cross-subsidy analysis? How would such an analysis be conducted?

- If the Board were to determine that a complainant has shown that a carrier is "revenue adequate" within the meaning of the *Guidelines* and applicable statutes (however the Board may decide to make that determination in a rate case), what does such a conclusion mean for specific rates or traffic?
- How (using what standards and methodology) should the RA constraint be applied to determining whether a specific challenged rate exceeds a maximum reasonable level?
    - If the "top-down" RA constraint is applied to a carrier's entire system, how does the Board determine which challenged rates exceed a reasonable maximum, and by how much?
- If the Board determines that the carrier has exceeded the RA constraint, how will it prescribe rates?
- Would the Board prescribe different rates for each of the individual challenged origins and movements? How will it determine the level at which rates will be prescribed?
- What is the appropriate prescription period for a rate found unreasonable under the RA constraint?
- How would the Board determine what, if any, reparations are appropriate for a rate found unreasonable under the RA constraint?

Most of the foregoing questions and issues are comprised of multiple subsidiary questions.[5] Resolution of those and numerous related issues may require significant additional briefing and legal argument. And, depending on how those issues are resolved, development and presentation of a RA case may require significant additional discovery and evidence beyond that required for a SAC case. Until the Board has considered such issues and how they may affect the procedural schedule, it would be difficult to make reasonable, informed judgments about an appropriate and realistic procedural schedule.

Second, the Complaint contains a paragraph suggesting that SMEPA may – or may not – seek to assert a claim that unspecified terms of NS's common carrier rates, terms and conditions might constitute unreasonable practices or charges. *See* Complaint ¶ 19. NS has filed a motion to dismiss that vague and indefinite claim. *See* Norfolk Southern Motion to Dismiss, STB

[5] The foregoing list is illustrative, and is not intended to be comprehensive or exhaustive.

Docket No. 42128 (filed Jan. 18, 2011). However, should the Board deny NS's motion, the parties will likely require additional discovery, evidence, and argument to explore that claim. Because SMEPA's inchoate claim is vague and speculative, it is difficult for NS or the Board to determine either its nature or what discovery and evidentiary submissions might be necessary to present such a claim for the Board's evaluation and determination. If this claim is allowed to proceed in this case, development and submission of necessary additional evidence could significantly affect the procedural schedule. Here again, the better course would be to defer any scheduling decisions until after the parties report the results of their conference to the Board following the end of mediation, as provided by the Board's governing regulation. *See* § 1111.10.

III. SMEPA'S ARGUMENTS FOR DISREGARDING THE PLAIN LANGUAGE OF THE REGULATION ARE UNAVAILING.

In response to the clear command of § 1111.10, SMEPA offers two arguments, neither of which is sufficient to grant its Motion. And, neither of SMEPA's technical arguments even *alleges* that the Complainant would suffer any harm whatsoever if the Board affirmed that the parties should follow the logical and reasonable sequence established by Section 1111.10.

First, SMEPA contends that older regulations touching on related matters should be read to negate the clear direction of the more-recently adopted mediation regulation. SMEPA first cites 49 C.F.R. § 1111.8, which was adopted in 1996, seven years *before* the Board first required mediation in SAC cases. Because mediation was not required at the time the Board adopted § 1111.8, it is entirely logical that the default procedural schedule set forth in that regulation did not provide for a conference of the parties to be conducted after the conclusion of the (not-yet-in-existence) mediation period.[6] Moreover, at the same time the Board established mandatory

[6] Indeed, the only Board regulation addressing alternative dispute resolution in Board proceedings at that time expressly provided that in the event parties voluntarily sought to mediate their dispute, the underlying proceedings – including the statutory deadlines for completion of

mediation for SAC cases, it promulgated a default procedural schedule which states – in the very provision on which SMEPA relies – that the conference of the parties should be "convened pursuant to § 1111.10(b)." *See* § 1111.8(a).[7] Section 1111.10(b), in turn, provides for the conference of the parties to be conducted "*after the mediation period ends.*"

Moreover, more than two years ago the Board expressly found that the schedule set out in Section 1111.8(a) was outdated and unworkable, and made clear it would no longer follow that schedule. Based on its experience in SAC cases and other developments since 2003, the Board determined in 2008 that the default procedural schedule set forth in Section 1111.8 was no longer appropriate and required modification:

> The default procedural schedule set forth at 49 CFR 1111.8 for rail rate cases that use our full Stand-Alone Cost test has grown dated due to the increasing complexity of these cases . . . Accordingly, we establish a modified procedural schedule for this case that we conclude is more reasonable, given our experience in these proceedings.

Seminole Elec. Coop., Inc. v. CSX Transp., Inc., Decision at 1, STB Docket No. 42110 (served Dec. 11, 2008) (emphasis added). Noting the numerous extensions of procedural schedules in recent SAC cases, the increasing complexity of SAC cases, and substantive and procedural changes made by the Board since 2003, the Board further found that those developments had "made the procedural schedule timeframe in section 1111.8(a) unworkable." *Id.* at 2.

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proceedings – could be held in abeyance for 90 days or more during the pendency of the mediation. *See* 49 C.F.R. § 1109.1 (adopted in 1992).

[7] As SMEPA notes in its Motion, residual language from the same provision of the 2003 default schedule suggests that the conference of the parties should take place with seven days of the filing of the complaint. To the extent the proposed schedule had any binding effect when enacted, it was necessarily superseded in 2007 by the amended Section 1111.10, which expressly addresses the timing of the conference of the parties in relation to the mediation period. *See 49* U.S.C. § 1111.10(b); *see also id. §* 1109.4(b) (providing for appointment of mediator within 10 days of filing of complaint, which is irreconcilable with the post-mediation conference of the parties being held within 7 days of the filing of the complaint). To eliminate confusion, the Board may wish to adjust its regulation by revising or eliminating the superseded default procedural schedule of Section 1111.8(a), and/or clarifying that the timing of the conference of the parties suggested by the former schedule has been superseded by Section 1111.10(b).

SMEPA also references another indirectly related regulatory provision, which states that mediation generally should "not affect the procedural schedule in stand-alone cost rate cases, set forth at 49 CFR 1111.8(a)." *See* 49 C.F.R. § 1109.4(f). The cited provision was promulgated at the same time as Section 1111.8(a), in 2003. As demonstrated, the Board subsequently concluded that the default schedule set forth in Section 1111.8(a) had been overtaken by developments and could no longer be applied. *See Seminole Electric*, Decision at 1-2. Regardless, complying with Section 1111.10(b) by holding the conference of the parties after the conclusion of mediation *would not affect* the procedural schedule proposed by SMEPA in its premature Motion. *See supra* II.A.

Second, SMEPA contends that if the Board were to apply the express terms of Section 1111.10(b) – adopted in a full notice-and-comment rulemaking with ample opportunity for interested persons to participate – to this case, it would violate the Administrative Procedure Act because SMEPA was not afforded sufficient opportunity to comment. *See* Motion at 5-6. Effectively, SMEPA's contention is that an entity that elected not to participate in the *Simplified Standards* rulemaking (STB Ex Parte No. 646 (Sub-No. 1)) should not be bound by regulations adopted in that proceeding that affect its interests. *See* Motion at 6. This is not the law. What is required by the law is notice and an opportunity to comment. *See, e.g.*, 5 U.S.C. § 553. SMEPA does not contend it could not have participated in Ex Parte 646, merely that it chose not to participate because the proceeding primarily involved procedures and standards for medium- and smaller-sized rate cases. *See* Motion at 6. Having chosen not to participate in the rulemaking, SMEPA is estopped from complaining, several years later, that it should not be bound by those rules.

Moreover, SMEPA is simply not correct that "virtually no" shippers "likely to become involved in [SAC] proceedings" participated in the *Simplified Standards* rulemaking. *See* Motion at 6. Contrary to SMEPA's assertion, a number of large coal, chemical, and grain shippers who might bring a SAC case (as well as associations representing their interests) participated in the *Simplified Standards* proceeding. Such participants included the Alliance for Rail Competition, PPL Energy Plus, Arkansas Electric Cooperative Corporation,[8] BASF Corporation, Cargill, Inc., Chevron Phillips Chemical Company, Dow Chemical Company, E.I. Du Pont De Nemours and Company ("DuPont"), the National Industrial Transportation League, Occidental Chemical Corporation, Olin Chemicals, U.S. Steel Corporation, the American Chemistry Council, the Fertilizer Institute, National Petrochemical and Refiners Association, and myriad agricultural groups, organizations, and agencies. *See Simplified Standards*, Decision at 11-12 (Sept. 5, 2007). Indeed, one of those commenters – DuPont – has a SAC case pending against NS right now, and it has not contended in that case that Section 1111.10(b) is inapplicable, or claimed that the Board violated the APA in adopting the regulation.[9]

Further, if SMEPA truly believed that Section 1111.10(b) was adopted in violation of the APA, its recourse was to file a timely petition for review of that provision with a federal court of appeals. Indeed, several affected parties – including both carriers and shippers – did challenge various aspects of the *Simplified Standards* rules in the U.S. Court of Appeals for the District of Columbia Circuit. *See CSX Transp., Inc. v. STB*, 568 F.3d 236, *vacated in part on reh'g*, 584

[8] Arkansas Electric's active involvement in Ex Parte 646 belies SMEPA's suggestion that no coal-burning utilities participated in the proceeding.

[9] Nor is it correct that a potentially affected party had no notice that aspects of SAC rules and procedures could be implicated or affected by the rulemaking. *See, e.g.*, STB Ex Parte 646 (Sub-No. 1), *Simplified Standards for Rail Rate Cases*, Notice of Proposed Rulemaking at 33-37 (served July 28, 2006).

F.3d 1076 (D.C. Cir. 2009).[10] Having failed to either: (i) participate in the underlying rulemaking; or (ii) challenge Section 1111.10(b) in an appeal, SMEPA is precluded from challenging the rule in this individual adjudication. *See, e.g., DuPont v. CSX Transp.*, STB Docket No. 42100, at 1 (June 30, 2008) (party to rate case "may not collaterally attack *Simplified Standards* in [an individual adjudication] proceeding.").

In sum, SMEPA's argument that the Board should disregard the clear express language of Section 1111.10 in favor of application of the residuum of prior regulations bearing only indirectly on the issue fails as a matter of law. And, because SMEPA can point to no harm whatsoever that it would suffer as a result of adherence to the regulation, there is no basis in law or equity to grant the Motion.

IV. ALTERNATIVELY, IF THE BOARD WERE TO ESTABLISH A PROCEDURAL SCHEDULE AT THIS JUNCTURE, IT SHOULD REJECT SMEPA'S PROPOSAL IN FAVOR OF A MORE FAIR AND REASONABLE SCHEDULE.

If, despite the infirmity of SMEPA's legal position and the scheduling uncertainties introduced by SMEPA's novel claims and arguments, the Board were to establish a procedural schedule prior to the conclusion of mediation, it should adopt a more fair and reasonable schedule. Assuming solely for the sake of discussion that this case were to involve no more discovery, briefing, analysis, or evidence than a case invoking only the SAC constraint, SMEPA's proposed date for completion of discovery and submission of opening evidence appears aggressive but achievable in light of the fact that many of SMEPA's discovery requests replicate those served on NS in *DuPont v. NS*, STB Docket No. 42125. And, NS would not object to SMEPA's proposal that it be granted eight (8) months from the filing of the Complaint (until September 2011) to prepare its Opening Evidence. *See* SMEPA Motion Appendix A. The

[10] If SMEPA believed its interests were not adequately represented by other petitioners seeking review, it could have sought to intervene in the appeal. *See* Fed. R. App. P. 15(d).

remainder of the proposed schedule, however, is not reasonable. While the schedule SMEPA proposes would afford it more than eight months for discovery and preparation of its opening evidence, it would allow NS only 90 days to analyze SMEPA's evidence and prepare NS's Reply evidence. *See id.* The same proposal would allow SMEPA 77 days to file its Rebuttal evidence, while allowing only 31 days for NS to file its final brief. *See id.*[11]

A more reasonable proposal would allow NS at least 135 days (during a period that would include the Thanksgiving, Christmas, and New Year holidays) to analyze SMEPA's evidence and prepare the only evidentiary filing the defendant is allowed on SAC issues. NS therefore proposes that, in the event the Board decides to issue a procedural schedule at this juncture, NS's Reply Evidence be due no earlier than January 20, 2012. This schedule would afford NS a similar amount of time for its Reply as the Board gave to the defendant in *Seminole,* even though this case involves a number of complex issues (*e.g.* those concerning the invocation and application of the RA constraint) not presented in *Seminole.*[12] *See Seminole Electric Coop. Inc. v. CSX Transp. Inc,* STB Docket No. 42110 (July 13, 2009). Similarly, the minimum interval for the filing of briefs should be 45 days after the filing of rebuttal evidence. *See Seminole v. CSXT* (Apr. 29, 2010) (scheduling filing of briefs 50 days after filing of complainant's rebuttal evidence). NS includes, in Exhibit A to this Reply, an alternative schedule that adds the minimum additional time described above to the SMEPA proposal.

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[11] SMEPA's proposed schedule apparently miscounts the days its schedule provides between the Reply and Rebuttal filing dates. *See* Motion Appendix A. NS assumes SMEPA seeks more than seventeen days to prepare its rebuttal evidence, which would be the case if the day count in its proposal were controlling (356 – 339 = 17).

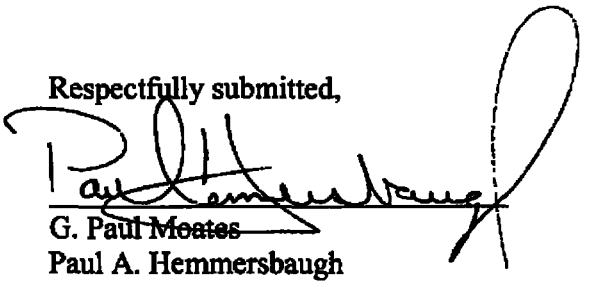
[12] In addition, a significant portion of the period NS will have to prepare its Reply Evidence in this case will overlap with the time for preparing its Reply Evidence in the pending *DuPont* case, STB Docket No. 42125. The same consultants and counsel represent NS in both cases.

To be clear, NS believes the best and most sound course is for the Board to apply the plain language of the governing regulation to deny SMEPA's premature Motion, and defer issuance of a procedural schedule until after the parties have reported the results of their post-mediation conference. NS therefore requests that the Board adopt NS's alternative proposed procedural schedule at this juncture only if the Board decides to issue a procedural schedule now rather than after the conclusion of mediation as provided by the Board's regulations.

CONCLUSION

For the foregoing reasons, the Board should deny SMEPA's premature motion, and – in accordance with 49 CFR § 1111.10(b) – issue a procedural schedule after the parties report to the Board their position on the appropriate schedule following a post-mediation. If and only if the Board decides to establish a schedule prior to the parties' conference, it should adopt a schedule that provides NS with at least 120 days to develop its Reply evidence and 45 days to file a final brief. *See* Exhibit A.

Respectfully submitted,



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Counsel to Norfolk Southern Railway Company

Dated: January 31, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2011, I caused a copy of the foregoing Reply in Opposition to Complainant's Motion to Establish Procedural Schedule to be served on the following parties by first class mail, postage prepaid or more expeditious method of delivery:

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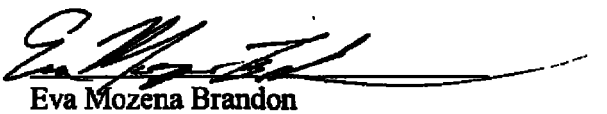

Eva Mozena Brandon

EXHIBIT A

South Mississippi Electric Power Association
v.
Norfolk Southern Railway Company,

STB Docket No. 42128

NORFOLK SOUTHERN PROPOSED PROCEDURAL SCHEDULE

Date	Day	Event
December 28, 2010	0	Complaint filed, discovery period begins
January 18, 2011	20	Defendant files Answer
June 15, 2011	169	Discovery Completed
July 15, 2011	199	Joint submission of operating characteristics
September 2, 2011	249	Complainant files Opening Evidence
January 20, 2012	388	Defendant Files Reply Evidence
April 4, 2012	463	Complainant Files Rebuttal Evidence
May 22, 2012	511	Parties File Final Briefs

EXHIBIT B

From: Moates, G. Paul
Sent: Tuesday, January 04, 2011 4:43 PM
To: Kelvin Dowd
Cc: William Slover; Christopher A. Mills; 'jeff@jacksonfirm.com'; Hemmersbaugh, Paul A.; Warren, Matthew J.
Subject: RE: SMEPA

Kelvin, we respectfully disagree with your interpretation of the Board's regulations. Section 1111.10(b) is clear on its face that it applies to "complaints challenging the reasonableness of a rail rate based on stand-alone cost or the simplified standards..." and it then explicitly states that the parties shall confer on discovery and procedural matters within 7 days after the mediation period ends. But as I indicated in my prior message, we are willing to discuss procedural matters, including schedules, with you now so we will expect your call at 11AM tomorrow and will look for your proposed procedural schedule in advance of that time. Regards, Paul

From: Kelvin Dowd [mailto:kjd@sloverandloftus.com]
Sent: Tuesday, January 04, 2011 3:29 PM
To: Moates, G. Paul
Cc: William Slover; Christopher A. Mills; 'jeff@jacksonfirm.com'
Subject: RE: SMEPA

Paul:
While the text of the Board's regulations admittedly may be less than clear, we respectfully disagree with your interpretation and with the conclusion that the Part 1111.10(b) conference in a *stand-alone cost* rate proceeding should not take place until after mediation has concluded. The language in Part 1111.10(b) referring to mediation was added in 2007 as a result of the Board's decision in Ex Parte No. 646 (Sub-No.1), the Simplified Rate Standards rulemaking. The only discussion of the language appears in the decision exclusively with respect to cases brought under the simplified rules; nothing in that decision proposed or purported to change any existing rule applicable to stand-alone cases. Indeed, while the decision adopted a new set of procedural scheduling rules (Part 1111.9) to apply to cases brought under the simplified standards, *no change* was made to Part 1111.8, which still provides that the Part 1111.10(b) conference in stand-alone cases is to take place 7 days after the Complaint is filed; i.e., by January 5 in the case of Docket No. 42128. Based on these facts, we believe that the correct interpretation of the language that you reference is that in cases under the simplified standards, a conference of counsel is to take place within 7 days after the abbreviated 20-day mediation period set for those types of proceedings. However, for cases under the stand-alone rules, which were not the subject of and were not affected by the Ex Parte No. 646 (Sub-No.1) decision, the rule remains as it was in 2008 when we conferred at the outset of the Seminole Electric case; that is, we are to confer to discuss scheduling and other matters within 7 days after the filing of the Complaint. Consistent with the foregoing, we request that you reconsider your position.
Based on your availability tomorrow, we propose a teleconference at 11am to discuss matters of scheduling and otherwise fulfill the requirements of Parts 1111.8 and 1111.10(b). We are preparing a proposed procedural schedule that takes due regard of the other rate proceedings now pending at the STB, which we will forward to you in advance of the call for your consideration. Please advise whether you are agreeable to proceeding in this fashion.
Best regards,
Kelvin

EXHIBIT B

From: Moates, G. Paul [mailto:pmoates@Sidley.com]
Sent: Tuesday, January 04, 2011 2:38 PM
To: Kelvin Dowd
Subject: SMEPA

Kelvin, I received your voicemail regarding the new rate case that SMEPA has filed against NS. You indicate that we need to have a conference no later than tomorrow in accordance with the Board's rules, but as you know, 49 C.F.R. Section 1111.10 specifies that in stand-alone cost cases "the parties shall meet, or discuss by telephone, discovery and procedural matters within 7 days after the mediation period ends." (emphasis added). Because to my knowledge no letter has yet even gone out to the parties from Chairman Elliott naming a mediator and commencing the mediation period in this case, your request seems to be premature. Having said that, I recognize that Section 1111.8(a) says that by Day 7 following the filing of a Complaint, "Conference of the parties convened pursuant to Section 1111.10(b)" – but again, the latter Section clearly contemplates that mediation shall have occurred before the parties begin to discuss litigation matters. Moreover, as I am know you are also aware, the Board in the Seminole Electric case expressly rejected the procedural schedule included in Section 1111.8(a) and in more recent cases has approved schedules that have longer filing intervals than those in that Section. So although I have no objection to chatting about the case and any issues that we might be able to meaningfully address in advance of the time specified by the Board's rules for dealing with discovery and matters such as a procedural schedule, we do not intend to enter into any agreements on such matters unless and until the mediation period has ended – assuming that it does end without a resolution of the case through the mediation process.

Please let me know if you wish to have an informal discussion in advance of the commencement of the mediation process. I could be available for a telephone call tomorrow morning at any point up until noon. Best regards, Paul

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